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No. 851

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

JOSEPH M. BRENNAN,
Petitioner,

vs.

CHARLES E. GROVER and JOHN E. GORSUCH, each individually, or jointly, or as agents, or partners in the Denver, Colorado law firm d/b as GORSUCH, KIRGIS, CAMPBELL, WALKER and GROVER, and JOHN DOE, JOHN ROE, JANE DOE, JANE ROE, and JOHN and JANE ROES unknown at the present time,

Respondents.

PETITIONER'S REPLY TO THE BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION OF JOSEPH M. BRENNAN FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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The false, vague, misrepresented and misleading nature of Respondents "Supplemental Statement of the Case," in contrast with the true facts as recited on pages 5 to 11 of the Petition, requires proper elucidation, viz:

RESPONDENTS BRIEF MAKES NO DENIAL OF THE FACTS

1. That Rock Wool Insulating Company (hereinafter referred to as: Rock Wool Co.) endorsed in blank Certificates of Stock, and the duly executed, irrevocable and verified assignments thereof, were delivered unto Petitioner in 1954 by said company's registered stockholders, and that same remained in Petitioner's possession thereafter, until stolen from him in 1957 or 1958 (Petition, page 5), and

2. That Petitioner acquired ownership of all of said endorsed in blank Certificates of Stock, and said duly executed assignment instruments, upon delivery thereof unto him by said registered stockholders in July, August and September, 1954, under the provisions of the Colorado Revised Statutes, Chap. 31, Art. 11, Sec. 1 (Page 11 of Petition APPENDIX, EXHIBIT "H"), and

3. That Petitioner was possessed of a Statutory right to recover his stolen personal property, viz, said Certificates of Stock and said assignment instruments, under the purview of Colorado Revised Statutes, Chap. 40, Art. 5, Secs. 2, 13 and 14 (Pages 11 and 12 of Petition APPENDIX, EXHIBIT "I"). And also, Rule 104 of the Colorado Rules of Civil Procedure (Petition, pages 18 and 19).

4. That Respondents in 1959, connived and conspired to obtain, and did then knowingly and surreptitiously obtain possession of Petitioner's stolen personal property, viz, said Certificates of Stock and assignments thereof, from the parties that stole same from Petitioner in 1957 or in 1958 (Petition, page 7), and

5. That in the United States District Court for the District of Colorado, the verdict of the jury in Case No. 7754 on February 2, 1965, was, that Petitioner was the owner of Rock Wool Co. endorsed in blank Certificate of Stock No. 1, and the owner of the pertinent assignment instrument; and, the verdict of the jury in Case No. 7958 in said Court on February 4, 1965, was that Petitioner was the owner of Rock Wool Co. Certificate of Stock No. 55, as registered in Petitioner's name since April 3, 1954, and as stolen from him in 1958 (Petition, pp. 8-9).

RESPONDENTS "SUPPLEMENTAL STATEMENT OF THE CASE" IS A FALSE, EVASIVE AND IMMATERIAL DISSERTATION

The false, misrepresented, deceptive and misleading nature of the assertion on page 3 of Respondents Opposition Brief that, the within replevin suit against Respondents, is: "a continuation of a long line of litigation conducted pro se by Mr. Brennan (Petitioner) against various parties", requires the elucidation as follows:

RESUME OF THE FACTS AND TRUTH IN RE: THE CASES CITED IN ITEMS (a) TO (l) ON PAGES 6 TO 9 OF RESPONDENTS OPPOSITION BRIEF

"(a) Civil Action No. 4860. Brennan v. Wills, Ltd.', was a replevin suit seeking possession of Rock Wool Co. endorsed in blank Certificate of Stock No. 46, which could not be delivered to said Brennan by the registered stockholders thereof, when the pertinent duly executed, irrevocable and verified assignment thereof was delivered

to said Brennan, by reason that said Certificate was then held in a pledged status. And, wherein it was adjudicated that, title to certificates and to the shares represented thereby can be transferred only in accordance with Colorado Revised Statutes (1953) Sec. 31-9-1 (now, Sec. 31-11-1).

Significantly, said Statute is affirmatively asserted on page 26 of Respondents Opposiiton Brief (the same Respondent in the instant suit), dated May 1959, in re: Petition No. 866 of said Brennan to the United States Supreme Court, as the controlling law, viz, that delivery of an endorsed in blank Certificate of Stock conveys title thereto and to what is represented thereby.

Significantly, also is the false and deceptive assertion on page 23 of said Respondents Opposition Brief to said Petition No. 866, viz: "Appellant Brennan, choosing to rely upon his status of stockholder * * * undertook to show that he became such a purchaser (of said Certificate No. 46) at public auction, and failed in his proof."

"(b) Civil Actions No'd. 6393, 6394, 6395 and 6396, Brennan v. Korholz, Usher, Allen & Speken", respectively, were replevin suits seeking possession of Rock Wool Co. endorsed in blank Certificates of Stock No'd. 4, 14, 16, 17 and 22, which could not be delivered to said Brennan by the registered stockholders thereof, when the pertinent duly executed, irrevocable and verified assignments thereof were delivered to said Brennan, by reason that said Certificates were then held in a pledged status. And, wherein it was adjudicated in accordance with the ruling in the above stated Case No. 4860, and

"(c) Civil Action No. 6741, Brennan v. Rock Wool

Insulating Company, et al", was a stockholders derivative suit, which was dismissed without prejudice on a Motion of the Respondent Charles E. Grover as counsel for defendants that, Brennan (petitioner) had not answered the interrogatories in said suit. Such suit was instituted incident to the dismissal of suit No. 6177, and for the reasons stated in item (d) as follows, and

"(d) Civil Action No. 6177, Allen, et al vs. Rock Wool Co. and Korholz, et al", was a Rock Wool Co. stockholders derivative action, wherein Petitioner, although a registered stockholder in Rock Wool Co., he was not named therein as a party plaintiff, and wherein said suit was dismissed on a joint Motion of plaintiffs and defendants, and which Motion registered a fraudulent statement concerning the ownership of Rock Wool Co. Certificate of Stock No. 48, matters pertinent thereto are as follows:

1. That Respondent Charles E. Grover, acting as counsel for the defendants, and as an officer of the Court, did connive and conspire with counsel for plaintiffs, and as officers of the Court, to file in the Court a Motion to Dismiss said Suit No. 6177 with prejudice, wherein it was registered with fraudulent intent and design on the part of each of said parties that, the plaintiffs Allens owned Rock Wool Co. Certificate of Stock No. 48, and

2. That each of said parties who had executed said Motion to Dismiss, and had filed same in the Court, had knowledge prior thereto that, Petitioner had purchased said Certificate No. 48 from the registered stockholder, viz, Herbert F. Greenwald (deceased) in 1955, and that Petitioner had not at any time subsequent thereto sold or assigned said Certificate No. 48 to any other party, and

3. That said Motion was filed in the Court secretly, and wherein Petitioner had no knowledge thereof, and

4. That Respondent Charles E. Grover's assertion that: "Brennan's (Petitioner's) oral petition for intervention (in said suit No. 6177) was denied", is false and is willfully and knowingly fraudulently intended and designed to mislead and deceive this Court. For, in fact, Petitioner served and filed a Motion to Intervene therein, and, Respondent Charles E. Grover as counsel for defendants, served and filed a Motion opposing Petitioner's said Motion to Intervene in said suit No. 6177. And, the Court incident thereto dismissed said suit No. 6177 with prejudice to all parties, except, Petitioner, and

5. That at the time of the hearing before the Court on said dismissal of said suit No. 6177, Petitioner had no knowledge of the said Motion to Dismiss same, which registered said false and fraudulent statement concerning said Certificate No. 48, and

"(e) Civil Action No. 34884, Reilly v. Rock Wool Co., et al", wherein Petitioner was not a party, and wherein Respondents assertion that: "Joseph M. Brennan's attempted intervention was denied", is false and is willfully and knowingly fradulently intended and designed to mislead and deceive this Court.

"(f) Civil Action No. 35528, Selers, et al vs. Korholz, et al", is a stockholders derivative action now pending in the District Court for Pueblo County, Colorado, and wherein Petitioner was not a party, and wherein the assertion of Respondents that: "Joseph M. Brennan's

attempted intervention was denied", is false and is willfully and knowingly fradulently intended and designed to mislead and deceive this Court.

"(g) Civil Action No. 36797, Brennan v. Kerholz, et al", was a suit by Petitioner as a registered Rock Wool Co. stockholder, to examine said Company's books.

"(h) Civil Action No. 36868, The People of the State of Colorado v. Bates, et al", is a pending Quo Waranto suit in the District Court for Pueblo County, Colorado.

"(i) Civil Action No. B-45641, Better Industries, Inc. v. Joseph M. Brennan (Petitioner), Anthony E. Reilly & Frances E. Morrissey (Deceased), wherein the following facts obtain:

1. That Better Industries, Inc. brought this suit with fraudulent intent and design, apparently under the Declaratory Judgment Act, and wherein it prayed that said Reilly be ordered to deliver to Better Industries, Inc. Rock Wool Co. unindorsed Certificate of Stock No. 55, as registered in Brennan's (Petitioner's) name since April 1954, and which was stolen from said Brennan by said Reilly in 1958. Therein, a void Summary Judgment was entered, and wherein no adjudication pertaining to said Certificate No. 55 exists, except, as rendered by the verdict of the jury on February 4, 1965, in said Case No. 7958 in the U. S. District Court at Denver, and as referred to in paragraph 5 on page 3 hereof, and wherein Petitioner was found to be the owner of Rock Wool Co. Certificate of Stock No. 55, and

3. That said Morrissey had received payment in full for the sale of said Company's duly endorsed in blank

Certificate of Stock No. 49 and what was represented thereby, and had delivered same to said Brennan, and which thereafter was cancelled and said Certificate No. 55 issued in said Brennan's name in place thereof, and

4. That said Reilly had attested under oath in said suit No. B-45641, that he had no right, title or interest in or to said Certificate No. 55, and

5. That the assertion of Respondent Charles E. Grover that: "Judgment was entered against Joseph M. Brennan (In case No. B-45641) on June 24, 1963" concerning said Certificate of Stock No. 55 or the ownership thereof, is fraudulently intended and designed to deceive and mislead this Court, as the ownership of said Certificate No. 55 has by the jury verdict in said replevin suit No. 7958 in the United States District Court on February 4, 1965, been established to be vested in said Brennan (Petitioner), and as referred to in paragraph 5 on page 3 hereof, and

6. That any judgment in said suit No. B-45641, in the said circumstances, is null, void and of no effect, and is not lawfully binding on said Brennan (Petitioner).

"(j) Civil Action No. 6192, United States Gypsum Company v. Rock Wool Co., Joseph M. Brennan, Intervener", was a patent infringement suit, wherein said Brennan intervened by reason that he was a registered and beneficial stockholder in Rock Wool Co., and also, a duly elected Director thereof and its Secretary-Treasurer, and wherein the trial court in dismissing intervener Brennan's intervetnion action, gravely exceeded its authority, abused its discretion and denied said Brennan due process

of law, and wherein the pertinent facts require proper elucidation, and as follows:

1. That despite the fact that said Brennan affirmatively stated in his intervention complaint that he was the registered owner of said Company's Certificate of Stock No. 55, and despite the fact that the Defendants affirmatively so stated in its Answer to said Brennan's complaint, the trial judge arbitrarily and capriciously ruled that said Brennan was never a Rock Wool Co. stockholder, and

2. That despite the fact that said Brennan moved to Dismiss his intervention action either with or without prejudice, the trial court wrongfully, arbitrarily and capriciously denied said Brennan his right to do so, and

3. That although the trial court affirmatively stated that it would rule only on whether or not that said Brennan (Petitioner) was a Rock Wool Co. Director and Officer, it wrongfully, arbitrarily and capriciously ruled on Petitioner's Rock Wool Co. Stockownership, and

4. That the trial court affirmatively stated that it was not ruling on any pending actions of said Brennan concerning any stockownership in said Company, and

5. That the trial court acted arbitrarily and capriciously in first dismissing said Brennan's intervention action, and thereafter ruling on various pending motions concerning said Brennan's rights in his said intervention action, and

6. That matters pertinent to the aforesaid are more fully set forth in the affidavit of said Brennan as ap-

pended hereto marked EXHIBIT "A", and by reference hereby made a part hereof as though set forth in full herein, and

7. That the trial court exceeded its authority, abused its discretion, acted arbitrarily and capriciously in holding said Brennan in contempt of court for filing a replevin suit No. 8828 against Respondent Charles E. Grover, et al, fining him $1,000.00 therein, which was suspended under the threat of reinstatement, should Petitioner file an appeal therein, and

8. That Respondent Charles E. Grover in the capacity of a Notary Public, executed an affidavit for said Herbert F. Korholz on February 12, 1960, concerning said case No. 6192 which knowingly and falsely represented that said Korholz executed said affidavit at Denver, Colorado, when in fact said Korholz was in a Federal Prison in Arizona, serving a sentence in connection with criminal action No. 15606 and a conviction therein rendered in the United States Court for the District of Colorado.

"(k) Civil Action No. 21253, Brennan v. City and County of Denver", was a replevin suit seeking recovery of Rock Wool Insulating Company Certificate of Stock No. 55, unindorsed and registered in said Joseph M. Brennan's name (Petitioner), and which certificate No. 55 is referred to in paragraph 5 on page 3 hereof.

"(l) Civil Action No. 8828, Brennan v, Grover, et al", was a replevin suit seeking recovery of Petitioner's said stolen personal property, wherein Petitnoner sought recovery of the specified endorsed in blank Rock Wool Insulating Company Certificates of Stock No'd. 4, 36, 40

and 45, which action concerned the contempt of court matter referred to in paragraph 7 on page 10 hereof.

THE PETITION COMPLIES WITH RULES 19 & 23 OF THIS COURT

The contention of Respondents in its "CONCLUSION" on page 9 of its Brief are erroneous, viz: (1) That the Petition does not comply with Rules 19 and 23; (2) that the Petition does not present any grounds upon which reversal could be predicated; and, (3) that the Petition is fatally defective and should be dismissed. With regard to the aforesaid and Respondents contentions as set forth on pages 2 and 3 of its Brief, the following elucidation is imperative, viz:

Rule 19 provides that a writ of certiorari will be granted where there are special and important reasons therefor. And, certainly a denial of the due process to Petitioner constitutes such a reason for review involving a Federal Question for resolution by this Court.

Rule 23(3) and (4) prescribes the form, manner and time in re submission of the Petition. And, certainly a perusal of the Petition as submitted reveals that all of the Rules have been fully complied with, despite the unwarranted denial and protracted delay of the Colorado Supreme Court in preparing and delivering the required certified transcript of record of the proceedings in the Courts below, and which record of proceedings includes the Opening Brief, Reply Brief and Petition for Rehearing of the Plaintiff in error, as were duly served, and which parts of the record are specified in Rules 21(1) and 26(1) of this Court.

Respondents contention that Petitioner violated Rule 23(3) by submitting with his Petition copies of the Opening and Reply Briefs of Plaintiff in Error to the Colorado Supreme Court, is a completely erroneous contention, for in fact, Petitioner did not submit any such copies of said Briefs with his Petition.

However, to make the Petition properly complete, and capable of conforming with Rule 23(4), and also to show how Petitioner obtained opportunity for the first time, to present the matter of denial of due process to Petitioner, such matter was set forth in the Petition on the pages and under the headings thereon, viz: In "QUESTIONS PRESENTED", at page 4, par. 3 (a, b and c); in "STATEMENT", at page 9, pars. 3 and 4 and at pages 11 and 12; in "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT", at page 13, pars. I to V; in "ARGUMENT", at pages 15 and 16.

DISMISSAL OF CIVIL ACTION NO. B-76366, WITHOUT GRANTING A HEARING THEREON TO PETITIONER, DENIED HIM DUE PROCESS.

In the paragraph at the bottom of page 5 of Respondents Brief a false, deceptive and misleading assertion is registered, and to wit:

> "The statements in the brief of Plaintiff in Error that he was not afforded a hearing on the dismissal of Civil Action No. B-76366 are incorrect. * * * but he was in Civil Action No. B-76366 granted a hearing before Judge Pinchick on January 6, 1965, which resulted in the order denying the Plaintiff's motion for rehearing or new trial which appears in the record at folio 104."

Although no trial was held on said suit No. B-76366, nor any hearing granted on the motion of defendants to dismiss said suit, it was incumbent upon Plaintiff-Brennan as a prerequisite to terminating said District Court's jurisdiction, to file a motion for rehearing or a new trial. And, after said District Court had entered its order on January 6, 1965, denying Plaintiff-Brennan's said motion to be granted his right to a hearing on the motion of defendants to dismiss said suit No. B-76366, Plaintiff-Brennan was then not only denied his right to such a hearing, but also denied then or at any other time any hearing on defendants' motion to dismiss, and Petitioner was thereby denied due process of law.

CONCLUSION

The dismissal of Petitioner's replevin suit wherein he sought recovery of his stolen personal property as wrongfully taken and wrongfully withheld by Respondents, without Notice of a Hearing, or the granting of any Hearing on Respondents Motion to Dismiss said suit, constitutes a denial of Petitioner's Constitutional rights and denial of the due process of law. The nature and effect of such action and conduct by the Courts below is of special and far reaching importance, and warrants review by this Court. For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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Denver 1, Colorado

APPENDIX — EXHIBIT "A" — AFFIDAVIT

JOSEPH M. BRENNAN, of lawful age first having been duly sworn on oath deposes and says:

That prior to the hearing on September 23, 1963, in re: Affiant's intervention in the U. S. Gypsum Co. v. Rock Wool Co. patent infringement suit No. 6192 in the District Court at Denver, Colorado, the trial Judge, Ewing T. Kerr, requested Affiant to state what was the issue to be adjudicated therein, and Affiant said it was set forth in the Prayer of the Intervention action, which Prayer Affiant then read to the Court, and which was as follows:

1. That he (Affiant) be granted his full rights in the Discovery Procedure.

2. For an accounting for the injury, losses and damages caused Intervener and/or Rock Wool Insulating Company by Defendants MPM Investment Company, Better Industries, Inc., and Herbert F. Korholz.

3. For a declaratory judgment holding that Intervener and/or Rock Wool Insulating Company are not liabel for any alleged infringement of Plaintiff's patents.

4. For an Order holding that MPM Investment Company, Better Industries, Inc., and Herbert F. Korholz are jointly liable for any injury, losses and damages arising out of the alleged infringement of Plaintiff's patents.

5. For an award of all costs and expenses incurred by Intervener in the within action.

That immediately after Affiant had read said Inter-

vention Prayer in open Court, the following discussion occurred, and, wherein said Judge Kerr will be referred to as the: COURT, and Joseph M. Brennan as: AFFIANT.

COURT: Now let me understand this. The only issue you want me to determine is whether or not you are a Director or Officer of Rock Wool Co.? AFFIANT: Yes, and the damage done to me by the patent infringement.

COURT: All right, then I will determine solely the question of whether or not you are a Director or Officer of Rock Wool Co. And if you are, then what damage was done; but if you are not: Then that answers the question, you are not entitled to an accounting. I have that straight now. That is the only thing I will determine.

That Affiant proceeded with the Intervention hearing on the issue of whether or not he was a Director or Officer of Rock Wool Co., and on September 24, 1963, at said hearing, said Judge Kerr, without any prior notice or without stating any reason therefor, induced the following discussion, and wherein Judge Kerr will be referred to as the: COURT, and Joseph M. Brennan as: AFFIANT.

COURT: I am going to determine title to the stock. AFFIANT: Well, your honor I will have to move to dismiss the cross-claim (Intervention action) because it will interfere with (Affiant's) pending suits.

COURT: Do you want to dismiss it with prejudice? AFFIANT: Without prejudice.

COURT: No. Sir. I will not dismiss it without prejudice. AFFIANT: Then I will dismiss it with prejudice because it would destroy me. COURT: I am going to decide this case we are going ahead with it.

Thereafter, said Judge Kerr said: I am going to dismiss the Intervener's complaint. Now these (pending) Motions. I suppose we had better—to keep the record clear, Mr. Clerk, pass upon them.

No. 4 Motion of defendants other than Brennan to continue trial. I will overrule that motion.

No. 5. Motions of defendants that depositions be taken before the Court, I will overrule that Motion, unless they have already been taken. You are winning here Mr. Brennan. I am ruling against these defendants (After he had dismissed Brennan's Intervention action).

No. 6. Motion of defendant Martha F. Korholz to quash or limit the Subpoena Duces Tecum (of Brennan which was never complied with). I will overrule that Motion.

No. 9. Motion of Intervener for an Order directing that Anthony E. Reilly fully comply with the Subpoena Duces Tecum. I will overrule that Motion.

No. 10. Motion of Intervener under the provisions of Title 2 8USC, Sec. 2283. I don't know—what is that? I don't have the Code here.

Motion of Intervener in Opposition to Stay Discovery Proceedings. I will overrule that Motion.

Motion of Defendants to Say Discovery Proceedings. I will overrule that Motion.

Motion of Anthony E. Reilly to quash or limit Subpoena Duces Tecum. I will overrule that Motion.

Motion of Intervener for production of documents and objects for inspection, copying and photographing. I will overrule that Motion.

Does that keep the records complete Mr. Clerk. Clerk: Yes.

Incident to the aforesaid the following discussion occurred on September 24, 1963, at said Intervention hearing, by said Judge Kerr who will be referred to as the: COURT, and Joseph M. Brennan who will be referred to as: AFFIANT.

AFFIANT: Does this ruling include (dismissal of) suits now pending in this Court—other suits that are now pending—and any future suits? COURT: I am not going to pass on that. That is one for the local judges to decide.

That two of said suits concerning ownership of Rock Wool Co. Certificates of Stock and what was represented thereby, were tried to jury in the United States District Court for the District of Colorado, viz: No. 7754, Brennan v. Sellers, on February 1 and 2, 1965, and verdict in favor of Brennan rendered in the amount of $55,330.00; and, No. 7958, Brennan v. Reilly, on February 3 and 4, 1965, and verdict in favor of Brennan rendered in the amount of $25,000.00.

That subsequently, Affiant filed a replevin suit No. 8828, Joseph M. Brennan v. Charles E. Grover, et al, in the United States District Court for the District of Colorado.

That on December 7, 1964, said Judge Kerr dismissed said suit No. 8828, without any prior notice thereof, or

granting to AFFIANT any hearing on dismissal of said replevin action No. 8828. However, thereupon said Judge Kerr declared that AFFIANT was in contempt of Court for filing said replevin suit No. 8828, and imposed a $1000.00 fine upon AFFIANT therefor.

That then said Judge Kerr entered an Order, viz: "And doth further Order, adjudge and decree that any appeal of this Order of dismissal (of said replevin suit No. 8828) with prejudice shall be prosecuted by Joseph M. Brennan, only on paying into the registry of the Court $1,000.00 fine imposed upon him this date in civil action No. 6192 by virtue of Joseph M. Brennan having been found guilty of civil contempt of court in said civil action No. 6192 as more particularly set forth in the separate Order of this Court entered this date in said civil action No. 6192."

That AFFIANT verily believes all of the foregoing to be true to the best of his knowledge and belief. Further AFFIANT sayeth nought.

(Signed) JOSEPH M. BRENNAN

Subscribed and sworn to before me this 4th day of February, 1966.

My Commission expires October 13, 1969

(Signed) SARAH MAPSTON
Notary Public

NOTARY SEAL
IMPRESSION
HERE